

ENTERED

May 10, 2016

David J. Bradley, Clerk

IN THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF TEXAS
GALVESTON DIVISION

ALBERT NICOLAS, JR., aka ALLEN,	§	
NICOLAS,	§	
TDCJ #00635504,	§	
Petitioner,	§	
VS.	§	CIVIL ACTION NO. 3:15-CV-257
	§	
WILLIAM STEPHENS, Director,	§	
Texas Department of Criminal Justice,	§	
Correctional Institutions Division,	§	
Respondent.		

ORDER

The petitioner, Albert Nicolas, Jr., aka Allen Nicolas (TDCJ #00635504), is a state inmate incarcerated in the Texas Department of Criminal Justice - Correctional Institutions Division (“TDCJ”). Nicolas filed a petition for a writ of habeas corpus under 28 U.S.C. § 2254 challenging the dismissal by the Texas Court of Criminal Appeals of a petition for discretionary review as untimely (Dkt. 1). On January 19, 2016, the Court issued a memorandum opinion and entered a final judgment dismissing the habeas petition with prejudice (Dkt. 9 and Dkt. 10). On April 5, 2016, Nicolas filed what amounts to a motion to reopen the time to file an appeal pursuant to Federal Rule of Appellate Procedure 4(a)(6) (Dkt. 16). The Court requested a statement from Nicolas describing the date on which and the circumstances under which Nicolas received notice of the Court’s final judgment (Dkt. 17). Nicolas has provided that statement (Dkt. 18).

After looking at Nicolas's statement and its own records, the Court finds that the Rule 4(a)(6) requirements are satisfied. Nicolas has submitted a declaration indicating that he first became aware of the Court's final judgment on April 5, 2016 when he received a copy of the Court's docket sheet (Dkt. 18 at pp. 1–2). The Court's records indicate that, as of that date, the final judgment had not been mailed to Nicolas. Nicolas filed his Rule 4(a)(6) motion on April 5, 2016 by placing it in the prison mailing system (Dkt. 18 at p. 1).

Specifically, the Court makes the following findings:

- (1) Nicolas did not receive notice of the Court's final judgment as defined by Federal Rule of Civil Procedure 77(d) within 21 days of the judgment's entry.
- (2) Nicolas filed his Rule 4(a)(6) motion on April 5, 2016, 77 days after the final judgment was entered. There is no indication that Nicolas received notice of the final judgment as defined by Federal Rule of Civil Procedure 77(d) before April 5, 2016, which is when his evidence indicates that he received the Court's docket sheet.¹ Nicolas's motion was therefore timely under either date provided in Federal Rule of Appellate Procedure 4(a)(6)(B), as he filed his motion within 180 days of the entry of the final judgment and within

¹ The Court will assume for the purposes of this motion that mailing the docket sheet to Nicolas constituted adequate notice under Federal Rule of Civil Procedure 77(d). *See United States v. Hurst*, 426 Fed. App'x 323, 325 (5th Cir. 2011) (explicitly reserving the question). Even if it did not, Nicolas's motion was still timely. *See* FED. R. APP. P. 4(a)(6)(B).

fourteen days of receiving the requested copy of the Court's docket sheet, which was the first properly served notice he received of the Court's judgment.

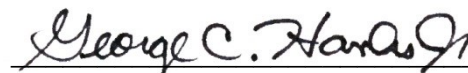
- (3) No party will be prejudiced if Nicolas's motion is granted. Nicolas's habeas petition was dismissed pursuant to Rule 4 of the Rules Governing Section 2254 Cases in the United States District Courts, and the Respondent was never served.

The Court finds that the conditions listed in Federal Rule of Appellate Procedure 4(a)(6) are satisfied. Accordingly, the Court **GRANTS** Nicolas's motion to reopen the time to file an appeal (Dkt. 16). The time to file an appeal is reopened for a period of fourteen days from the date of this order. *See* FED. R. APP. P. 4(a)(6).

Any other pending motions are **DENIED**.

The Clerk of this Court shall send a copy of this Order to the parties.

SIGNED at Galveston, Texas, this 10th day of May, 2016.

A handwritten signature in cursive script, reading "George C. Hanks Jr.", written over a horizontal line.

George C. Hanks Jr.
United States District Judge